

STATE OF MICHIGAN
COURT OF APPEALS

CAROLYN BRYANT,

Plaintiff/Counterdefendant-
Appellant,

v

ARZO THAMES,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

June 1, 2001

No. 212734

Oakland Circuit Court

LC No. 91-406597-DO

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's June 3, 1998, supplemental judgment of divorce. We affirm.

I

The parties married on October 1, 1977. Plaintiff was then forty-three years old and defendant was fifty years old. They had no children together. On March 1, 1991, plaintiff filed a complaint for divorce, alleging a breakdown in the marriage and physical abuse by defendant. Defendant filed a counterclaim for divorce, alleging likewise that plaintiff had battered defendant. After a series of motions and trial adjournments, two years later, on March 4, 1993, the trial court granted plaintiff's motion for partial summary disposition, granting her a judgment of divorce without prejudice on the remaining issues between the parties.¹

Discovery continued amidst allegations that plaintiff was concealing assets. Following further delays and trial adjournments, the parties stipulated to referring the case to a friend of the

¹ The grant of partial summary disposition resulted in a bifurcated divorce proceeding. Although not raised as an issue on appeal, we note that this Court has since found such bifurcation to be a violation of MCR 3.211(B)(3), which expressly provides that a judgment of divorce must include a determination of the parties' property rights. *Yeo v Yeo*, 214 Mich App 598, 601-602; 543 NW2d 62 (1995).

court (FOC) referee for trial in January 1994, agreeing that the referee would make findings of fact and rulings, which could be adopted by the circuit court, and that the parties could appeal to the circuit court on the record. Following several days of testimony and other evidence, the FOC referee issued his findings and recommendations in July 1994, awarding defendant \$116,567 in assets and plaintiff \$102,965 in assets, and additionally awarding to defendant 1) financial accounts valued at \$12,335 as a sanction for plaintiff's concealment of assets, 2) alimony² of \$350 a month, and 3) attorney fees of \$10,000.

Plaintiff filed objections to the referee's findings and a motion for rehearing before the circuit court in September 1994. However, because transcripts of the hearings before the referee were not yet available, on November 24, 1994, the circuit court ordered that plaintiff obtain the transcripts as soon as possible and re-precise the motion within a reasonable time thereafter. The transcripts were filed with the court in August 1995, but no rehearing was scheduled. In June 1998, the court granted defendant's motion for a supplemental judgment of divorce in accordance with the referee's findings, on the basis that plaintiff failed to diligently pursue her objections to the findings and more than two years had elapsed since the transcripts were filed. Plaintiff appeals the entry of the supplemental judgment of divorce.

II

Plaintiff first claims that the circuit court erred in adopting the referee's recommendations concerning property division, alimony, and attorney fees without a de novo review because such review is required by statute, MCL 552.507(5); MSA 25.176(7)(5), and under the court's order referring the case to the FOC referee. We find no error.

A

MCL 552.507(5); MSA 25.176(7)(5) governs the review of domestic relations hearings before FOC referees and provides that a trial court "shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court." However, if the parties consent, a judicial hearing may be based solely on the record of the hearing before the referee. *Cochrane v Brown*, 234 Mich App 129, 132-133; 592 NW2d 123 (1999), citing MCR 3.215(F)(2). Plaintiff stipulated in open court to a hearing before FOC referee Patrick Cronin, in which he would make findings of fact and rulings, subject to appeal to the circuit court on the record. Plaintiff's stipulation in open court is binding consent. MCR 2.507(H); *In re Vanidestine*, 186 Mich App 205, 212; 463 NW2d 225 (1990). The parties' agreement was reflected in the court's subsequent order, which expressly stated that the decisions of referee Cronin "shall be appealable" to the circuit court only on the record and not de novo. Because plaintiff consented to an appeal only on the record, the requirement for a de novo hearing under MCL 552.507(5); MSA 25.176(7)(5) is inapplicable.

² MCL 552.23(1); MSA 25.103(1) was amended by 1999 PA 159, effective November 3, 1999, to change "alimony" to "spousal support." The term alimony is used in this opinion.

B

Plaintiff also contends that the circuit court was obligated to conduct a review of the referee's decision under the court order. Plaintiff argues that the court erred in declining to conduct the review on the basis of laches because defendant made no claim of prejudice as a result of plaintiff's delay in seeking review. We conclude that the trial court did not err in entering a supplemental judgment of divorce, either on the basis of laches or under the court's inherent power to sanction misconduct and control the movement of cases on its docket, given the circumstances of this case.

1

Laches is an affirmative defense primarily based on circumstances that render inequitable the granting of relief to a dilatory plaintiff. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000); *City of Holland v Manish Enterprises*, 174 Mich App 509, 512; 436 NW2d 398 (1988). The defense of laches is based on the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990). Laches applies when there has been an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice. *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996).

Further, a court has inherent power to sanction misconduct and control the movement of cases on its docket. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963); *Persichini v William Beumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999). A court's power to sanction includes such actions as dismissal. *Id.* at 640.

2

At the conclusion of the hearings before referee Cronin in February 1994, he indicated that the parties were to submit proposed findings, after which he would issue his opinion. On May 27, 1994, the referee filed a notice of intent to dismiss for no progress, indicating that the parties had "[f]ailed to file findings of fact, ect. [sic]." Apparently, plaintiff did not subsequently file the requested proposed findings.³ Two months later, on July 26, 1994, referee Cronin issued his findings and decision, followed by a letter of clarification on September 6, 1994.

The month following the referee's decision, plaintiff substituted counsel. On September 23, 1994, plaintiff's new counsel filed objections to the referee's findings and a motion for rehearing, alleging among other things, that: 1) the referee's decision was without foundation in fact or law because plaintiff's former counsel failed to adequately represent plaintiff's position

³ This Court requested, but did not receive, from plaintiff's counsel a copy of plaintiff's proposed findings.

relative to fault in the breakdown of the marriage and the allocation of assets, 2) former counsel failed to produce evidence of plaintiff's separate assets, 3) the referee awarded defendant attorney fees without justification or explanation, and 4) the award of alimony to defendant was excessive and against the great weight of the evidence. Defendant responded that the circuit court could not hear plaintiff's objections without the transcripts of the FOC hearings because any appeal was limited solely to the record.

On November 23, 1994, the circuit court ordered plaintiff to "obtain copies of [the] transcripts as soon as possible ... and re-precise the motion within a reasonable period of time thereafter."⁴ Approximately four months later, on March 15, 1995, defendant filed a motion for entry of a supplemental judgment of divorce, contending that more than a reasonable time had elapsed since plaintiff obtained the FOC hearing transcripts, that plaintiff had taken no action to pursue her appeal of the FOC decision, and that "[c]ontinuing delay in the finalization of these proceedings have an adverse effect upon the emotional stability of the Defendant and deprive Defendant of the possession and enjoyment of his share of marital assets." At the hearing on defendant's motion, plaintiff's counsel informed the court that he had received the transcripts in January 1995, but that he did not re-precise his objections to the referee's findings because the transcripts appeared to be incomplete. The parties discussed other means of settling the record, which the court left to the parties, and a status conference was scheduled for May 10, 1995.

Over the next two years, plaintiff apparently made no effort to pursue her objections to the referee's findings. When defendant subsequently sought entry of a supplemental divorce judgment in accordance with the referee's decision, the circuit court granted the motion, finding that plaintiff had allowed too much time to pass without pursuing her objections.

3

On these facts, we agree that plaintiff was dilatory in pursuing her objections. Plaintiff provides no explanation for failing to seek a review of the referee's decision during the more than two years following the receipt of the transcripts. During this time, each party was apparently responsible for and in control of various homes and other assets. We cannot agree with plaintiff's claim that laches is inapplicable because defendant did not assert a claim of prejudice. In his motion for entry of a supplemental judgment, defendant asserted that further delay in finalizing the proceedings adversely affected his possession and enjoyment of his property. Defendant subsequently alleged in an amended motion that problems were arising with property potentially awarded to defendant as a result of plaintiff's withdrawals from annuities and insurance policies, removal of defendant as a beneficiary on certain policies, and various real estate transfers to friends and relatives. In view of these claims, and the prejudice inherent in a three-year delay in finalizing a division of the parties' numerous assets, the circuit court did not

⁴ Plaintiff's counsel objected to defense counsel's proposed date for a hearing on plaintiff's objections, and requested a period of "at least thirty (30) days after receipt of the transcripts to permit Plaintiff's counsel the opportunity to review" the transcripts.

clearly err in declining to address plaintiff's objections to the referee's decision on the basis of laches. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998).

Further, plaintiff offers no explanation for her continuing delay in seeking a review of the referee's decision after her receipt of the transcripts. We conclude that the court properly declined to endorse plaintiff's dilatory conduct and her failure to comply with the court's order that she bring her objections on for hearing within a reasonable time after receiving the transcripts, as a matter of the court's inherent power. *Persichini, supra* at 640.

III

We find no basis for granting relief on plaintiff's remaining claims. Plaintiff claims that the court clearly erred in adopting the referee's recommendations concerning the division of property and the award of alimony, and abused its discretion in awarding attorney fees. Plaintiff argues that these decisions were based on insufficient or inadequate findings and were inequitable. Further, the award of attorney fees to defendant was unsupported by the evidence. Because any error was one to which plaintiff contributed by her own negligence or inaction, we deem these issues waived. Error requiring reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998).

Further, these issues are not preserved for review because they were not properly presented to the trial court. Plaintiff failed to timely seek review of the referee's decision, as ordered by the circuit court on November 23, 1994. We found no error in the circuit court's refusal to hear plaintiff's objections more than two years after receiving the transcripts. Thus, we review the property division, alimony, and attorney fee issues only to determine whether the failure to consider them would result in entry of an unconscionable decree. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142; 500 NW2d 115 (1993). We do not so find.

A

As discussed at length above, plaintiff contributed to the errors of which she complains. Plaintiff, by her own admission, failed to avail herself of the opportunity to present her case in the first instance before the FOC referee, and, subsequently, to properly and timely seek redress before the circuit court of any errors in the FOC decision. The record shows that plaintiff caused delays in the proceedings by concealing assets and caused a bifurcated divorce proceeding by moving for partial summary disposition. Plaintiff thereafter agreed to the hearing before the referee with review before the circuit judge on the FOC record. Plaintiff contributed to further delay by failing to comply with an order of the court that she re-precise her motion, raising objections to the referee's decision, within a reasonable time after the FOC transcripts were prepared. Finally, while plaintiff encountered difficulties obtaining a complete transcript of the referee hearing, there is no indication that plaintiff pursued a settled statement of facts regarding the missing transcript, as proposed by defense counsel.

B

Our failure to review these issues would not result in an unconscionable decree. Referee Cronin made specific findings of fact concerning various factors relevant to a division of assets, and we find no deficiency in the findings that would warrant a remand. A remand for further factual findings is unnecessary when it appears that the court was aware of the issues and correctly applied the law, and where further explanation would not facilitate appellate review. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). This Court gives special deference to a trial court's findings when based on the credibility of witnesses, *Draggoo, v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997), as in this case, where the primary testimony concerning the challenged factors, e.g., fault, came from the parties themselves.

It is undisputed that plaintiff was the primary wage-earner in the family and that she brought assets into the marriage, which were in part converted into the purchase of the marital home. However, the evidence and value of separate property claimed by plaintiff, beyond that allocated by referee Cronin, was subject to dispute, as was the issue of fault in the breakdown of the marriage. The record supports referee Cronin's conclusion that plaintiff concealed assets and was not forthright in her disclosures of financial dealings, such as disbursements of several thousand dollars. We do not find the division of property unconscionable.

With regard to alimony, we cannot conclude that the referee's decision failed to consider relevant factors in determining whether alimony was just and reasonable. *Thames v Thames*, 191 Mich App 299, 307-308; 477 NW2d 496 (1991). Plaintiff does not allege that the referee's findings concerning the parties' age and earnings was clearly erroneous. Plaintiff was fifty-nine years old and earned in excess of \$57,000 annually. Defendant was sixty-seven years old, retired, with an annual income of \$12,708. Although plaintiff contends that the award of alimony was unreasonable, in part because defendant chose not to work, whether defendant was physically able to perform offered custodial work was a disputed issue. We do not find the award of monthly alimony of \$350 unconscionable.

Regarding attorney fees, plaintiff contends that the award of \$10,000 to defendant was an abuse of discretion because defendant made no showing of need and was equally responsible for prolonging the proceedings. This Court has cautioned that a court should make specific findings regarding the necessity of a fee, but has found that the failure to do so is harmless where there is clear evidence of necessity in the record. *Stackhouse v Stackhouse*, 193 Mich App 437, 445-446; 484 NW2d 723 (1992). Although referee Cronin's finding of necessity in this case was brief, viewed in light of the evidence, it was sufficient to conclude that there was no abuse of discretion. Plaintiff's assertion that defendant was equally at fault for drawing out the proceedings is without merit, given referee Cronin's finding that plaintiff attempted to conceal assets. We find no unconscionable result warranting further review.

C

Finally, plaintiff claims that she was denied due process where the divorce proceedings were bifurcated and were "bounced" back and forth between the FOC and the circuit court. Plaintiff has made no claim of error requiring reversal, where the alleged error resulted from

plaintiff's own actions. In 1993, three months before the scheduled trial, plaintiff moved for partial summary disposition, which the court granted, resulting in a bifurcated proceeding. Plaintiff stipulated to the hearing before the FOC. Following the hearings, plaintiff's substituted counsel alleged that her former counsel was negligent in presenting evidence before the FOC referee, and he sought review of the referee's decision. Further, although the FOC referee requested proposed findings before issuing his decision, it appears that plaintiff did not offer proposed findings. "The law regards the neglect of an attorney as the client's own neglect and will give no relief from the consequences thereof." *Everett v Everett*, 319 Mich 475, 482; 29 NW2d 919 (1947), quoting 39 Am Jur, New Trial, § 152, p 159 and *Jones v Leech*, 46 Iowa 186 (1877).

Affirmed.

/s/ Janet T. Neff

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen